Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. The Federal Tort Claims Act (FTCA)'s judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented by the petition is:

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

2. In addition, in its order granting certiorari in this case (125 S. Ct. 2547), the Court directed the parties to brief and argue the following question:

Did the court of appeals have jurisdiction over the interlocutory appeal of the district court's order denying a motion to dismiss under the FTCA's judgment bar, 28 U.S.C. 2676.

PARTIES TO THE PROCEEDING

Petitioners are Richard Will, Dennis P. Harrison, Margaret M. Jordan, Thomas Virgilio, and Robert C. Bonner.*

Respondents are Susan Hallock and Ferncliff Associates, Inc., d/b/a Multimedia Technology Center.

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* The court of appeals directed that Robert C. Bonner "should be dismissed from this action" because he did not hold office at the time of the events at issue in the litigation. Pet. App. 2a n.1. Because the district court has not yet entered an order of dismissal, he joins in the petition as a protective matter. Additional John and Jane Doe defendants were named in the complaint, but no defendants other than those identified in the text were served.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 387 F.3d 147. The opinions of the district court (Pet. App. 18a-26a, 27a-40a) are reported at 281 F. Supp. 2d 425 and 253 F. Supp. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2004. A petition for rehearing en banc was denied on January 4, 2005 (J.A. 4). The petition for a writ of certiorari was filed on April 4, 2005, and was granted on June 6, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346(b), 2671 *et seq.*, are set forth at App., *infra*, 1a-9a.

STATEMENT

1. The judgment bar in the Federal Tort Claims Act protects a federal employee from suit where the claimant has brought an action against the United States under the FTCA, that action has gone to judgment, and the suit against the employee concerns the same subject matter. The judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Section 1346(b) is the jurisdictional provision of the FTCA. It provides the district courts with "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that "[s]ubject to the provisions of chapter 171 of this title," the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Chapter 171 of Title 28 contains the various procedural and liability provisions of the

FTCA, as well as the exceptions to the FTCA. See 28 U.S.C. 2671-2680.

2. In June 2000, federal officers seized several computers from respondents pursuant to a lawful warrant obtained in connection with a child-pornography investigation. Pet. App. 28a. No criminal charges were filed against respondents, and the seized computers were returned to them on December 21, 2000. *Id.* at 28a-29a & n.1.

3. In July 2002, respondents filed an FTCA action against the United States in the United States District Court for the Northern District of New York. In their complaint, respondents alleged that some of the computers seized in the government's investigation were damaged while in the government's custody, and that the resulting loss of personal and business records caused respondents to close their business. Pet. App. 29a. The sole basis for jurisdiction asserted in respondents' complaint against the United States was 28 U.S.C. 1346(b), the jurisdictional provision of the FTCA. Pet. App. 27a. The complaint sought money damages against the United States for injury or loss to respondents' property caused by the allegedly negligent acts of employees of the United States Customs Service and other governmental agencies while acting within the scope of their employment. *Id.* at 27a-28a, 29a-30a.

The United States moved to dismiss the claim under Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim on which relief can be granted) based on the FTCA's detention-of-goods exception, 28 U.S.C. 2680(c). Pet. App. 28a. That provision establishes an exception to the United States' liability under the FTCA for "[a]ny claim arising in respect of the assessment or collection

of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). Respondents contended that Section 2680(c) applied only to officers collecting customs duties, and in any event did not apply to their claims because their claims related to the "seizure" of the computers, rather than their "detention." Pet. App. 32a.

The district court granted the United States' motion to dismiss the FTCA action. Pet. App. 27a-40a. The court held that 28 U.S.C. 2680(c) precluded respondents' claims regardless of whether the seizure and detention of their goods was related to the collection of customs duties or to other law-enforcement purposes, and that the protection afforded by the exception is not limited to actions of officials of the Customs Service or Internal Revenue Service but extends to the actions of all law enforcement officers. Pet. App. 32a-35a. The court also rejected respondents' argument that their claims concerned the "seizure" of the computers, rather than their "detention." *Id.* at 35a-38a. The court determined, to the contrary, that respondents' claims for "negligent destruction of property, conversion, negligent bailment, larceny, misfeasance, and personal injury" all "arise 'out of the detention' of their property, and are thus precluded by § 2680(c)." *Id.* at 38a-40a. The district court entered a final judgment dismissing respondents' claims on March 24, 2003. J.A. 36. Respondents did not appeal. Pet. App. 6a.

4. Seven months after filing their FTCA suit, respondents filed a second suit—the case presently before the Court. The initial complaint in the present suit asserted that petitioners, federal officers who allegedly participated in the search and seizure of respondents' computers, were liable under the common law of torts and under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for negligently depriving respondents of their intellectual property and business income in violation of respondents' rights under the Due Process Clause of the Fifth Amendment. See J.A. 24-26.

Petitioners moved to dismiss the suit based on the existence of the prior FTCA judgment, 28 U.S.C. 2676, the exclusiveness of the FTCA remedy for the common-law torts, 28 U.S.C. 2679(b)(1), failure of respondents' negligence allegations to state a claim for a constitutional violation, and qualified immunity. While the motion to dismiss was pending, respondents amended their complaint to delete the common-law negligence claims and to allege that petitioners had acted intentionally in damaging respondents' computers. See J.A. 34.

Petitioners then moved for judgment on the amended pleadings, contending that respondents' suit was precluded by the FTCA's judgment bar, 28 U.S.C. 2676, and that respondents failed to allege facts supporting the allegation of intentional misconduct. The district court denied petitioners' motion. Pet. App. 18a-26a. The court first considered whether its prior judgment in the FTCA action was issued under Rule 12(b)(1) or Rule 12(b)(6). *Id.* at 21a. The court believed that distinction to be significant because, according to the court, filing an FTCA claim that is subject to dismissal for lack of jurisdiction based on one of the exemptions in Section 2680 is a mere "procedural error" that has nothing to do with the "merits of [the] claims," and a subsequent suit against federal employees arising out of the same subject matter should not be barred by the FTCA's judgment bar. *Id.* at 21a-22a & n.2.

The district court acknowledged that 28 U.S.C. 2676 places no qualification on the term "judgment," Pet. App. 23a (noting "the absence of qualifying language in the statute"), and that the statute "was intended to prevent dual recovery from both the government and its employees, and the waste of government resources in defending repetitive suits," *id.* at 20a. But the court nevertheless construed Section 2676 not to apply where the prior FTCA judgment was based on one of the FTCA's exceptions to the waiver of sovereign immunity. *Id.* at 23a. Characterizing such a judgment as merely a "procedural loss" for the FTCA plaintiffs, *id.* at 24a, the district court held that "allowing plaintiffs to proceed [would] not offend the purposes of § 2676," *id.* at 26a.

The court also denied petitioners' claim to qualified immunity, concluding that respondents' allegation of intentional misconduct was sufficient to survive a motion to dismiss. Pet. App. 25a.

5. After the district court denied their motion for judgment on the pleadings, petitioners moved the district court to certify the judgment-bar issue under Section 2676 for appeal under 28 U.S.C. 1292(b). The district court denied that motion on the ground that there was not a "substantial ground for difference of opinion" on the question presented. J.A. 38 (quoting 28 U.S.C. 1292(b)). The court also noted, however, that denying the motion "would not, of course, bar an appeal as of right under the collateral order doctrine, if it is applicable." *Ibid.*

6. a. Petitioners appealed, relying on the collateral order doctrine and the All Writs Act, 28 U.S.C. 1651, to establish jurisdiction. Pet. App. 9a-10a. The court of appeals held that an order denying a motion to dismiss on the basis of the FTCA's judgment bar is immediately

appealable pursuant to the collateral order doctrine recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it "constitutes a conclusive determination of the disputed issue," is "completely separate and distinct from the merits of the action," and "will not be *effectively* reviewable on appeal from a final judgment." Pet. App. 10a. Although the court of appeals recognized that the Third Circuit had held that such orders are not immediately appealable, *id.* at 11a (citing *Brown* v. *United States*, 851 F.2d 615, 619 (3d Cir. 1988)), it reasoned that the judgment bar is intended to "confer[] statutory immunity from suit," rather than simply a defense to liability, and that immediate appeal is therefore proper by analogy to decisions permitting immediate appeal of a denial of qualified immunity in a *Bivens* suit. See Pet. App. 10a-11a (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). The court of appeals noted that its ruling on appellate jurisdiction was consistent with the Tenth Circuit's decision in *Farmer* v. *Perrill*, 275 F.3d 958, 961 (2001) (holding denial of motion to dismiss on judgment-bar grounds immediately appealable).

On the merits, the court of appeals affirmed the district court's conclusion that Section 2676 does not bar respondents' *Bivens* claim. Pet. App. 1a-15a. The court of appeals rejected the district court's distinction between procedural and merits-based FTCA judgments. *Id.* at 14a. The court nevertheless held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b)'" that triggers the judgment bar. *Ibid.* (quoting 28 U.S.C. 2676). The court

reasoned that there was no "judgment" in respondents' prior case for purposes of the judgment bar in 28 U.S.C. 2676 because "the action was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Ibid.* According to the court,

> for the judgment bar to apply, the action must first be a proper one for consideration under the Federal Tort Claims Act. In other words, it must fit within the category of cases for which sovereign immunity has been waived. If it does not, then a judgment declaring a lack of subject matter jurisdiction denotes that sovereign immunity has not been waived and that the case is not justiciable in any event.

Ibid.

b. District Judge Marrero, sitting by designation, concurred separately. Pet. App. 15a-17a. He would have adopted the district court's distinction between dismissals on the merits and dismissals on procedural grounds, rather than the majority's analysis focusing on whether the basis for the prior judgment was a lack of subject matter jurisdiction. *Id.* at 15a. Judge Marrero recognized, however, that both the approach of the district court and that of the court of appeals majority "read an implied term" into the judgment bar. *Id.* at 16a.

SUMMARY OF ARGUMENT

I. The judgment bar in Section 2676 confers on federal employees an immunity from suit where those acts have already been the basis for an FTCA action against the United States that has gone to judgment. The district court's rejection of that immunity was immediately appealable under the collateral order doctrine articulated by the Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). An appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (brackets in original) (quotation marks omitted).

Each of these three criteria is satisfied here. The district court order conclusively determined that petitioners were not entitled to the judgment bar. That issue is separate from the merits of respondents' *Bivens* claim, because whether it applies turns on whether respondents' prior FTCA claim on the same subject matter is the subject of a final judgment, and has nothing to do with the merits of the *Bivens* claim itself. Finally, a federal employee's statutory rights under the judgment bar can be vindicated *effectively* only by immediate appeal from an order denying those rights.

Both the text and purpose of the judgment bar demonstrate that it protects government employees not only from adverse money judgments, but also from the burdens and distractions of discovery and trial. By its terms, Section 2676 establishes a "*complete* bar" to "*any* action" once there is an FTCA judgment arising out of the same subject matter. 28 U.S.C. 2676 (emphasis added). It is, in other words, a statutory immunity from the litigation itself. This Court has upheld the immediate appealability of other claims of immunity relating to a government employee's official acts, including qualified immunity and Speech or Debate Clause immunity, and petitioners' claim of statutory immunity is similarly worthy of immediate vindication.

II. Section 2676 provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. It is undisputed that respondents brought a prior action concerning "the same subject matter" as this suit against the federal-employee petitioners, that the prior suit was brought "under section 1346(b)," and that there was a final "judgment" in the prior suit. *Ibid.* Thus, as respondents have acknowledged (Br. in Opp. 6), under the "literal, unconditional text" of Section 2676, each of the three statutory elements for application of the bar is met.

Nonetheless, the court of appeals found the judgment bar inapplicable by reasoning that because the prior action was dismissed under one of the exceptions to the FTCA provided in 28 U.S.C. 2680, it "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity" for purposes of Section 2676. Pet. App. 14a. Besides being inconsistent with the text and purpose of Section 2676 itself, that holding cannot be reconciled with this Court's interpretation of other parallel provisions in the FTCA or with the nature of the Section 2680 exceptions as reflected in the overall structure of the Act.

In addition to Section 2676, the FTCA has other provisions that limit a plaintiff's ability to sue defendants other than the United States for injuries resulting from a federal employee's actions. In *United States* v. *Smith*, 499 U.S. 160, 166 (1991), this Court held that one of those exclusivity provisions, 28 U.S.C. 2679(b)(1), barred a tort suit against an individual employee even if, as a result of one of Section 2680's exceptions, "the FTCA

itself does not provide a means of recovery." 499 U.S. at 166. The Court recognized that Section 2679(b)(1) applies even though the plaintiff's alternative remedy is an "action * * * pursuant to section 1346(b)," 28 U.S.C. 2679(d)(4), in which one of the Section 2680 exceptions may ultimately preclude relief. 499 U.S. at 166.

The FTCA's other exclusivity provision, 28 U.S.C. 2679(a), provides that, despite any federal agency's sue-and-be-sued clause, the FTCA remedies are exclusive for all "claims which are cognizable under section 1346(b)." In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), the Court held this provision encompasses all claims that are "actionable under § 1346(b)," in the sense that they allege the basic elements of jurisdiction set forth in Section 1346(b). *Id.* at 477. As numerous courts of appeals have recognized, applying *Meyer*, a claim against a federal agency that alleges the basic requirements of Section 1346(b) is "actionable under § 1346(b)," and must be pursued against the United States under the FTCA, even if one of the exceptions in Section 2680 is likely to prevent recovery.

The Second Circuit offered no explanation why the phrase "action under section 1346(b)" in Section 2676 excludes suits that allege the basic elements of Section 1346(b) but are ultimately dismissed on the basis of Section 2680, when the parallel provisions of Section 2679(b)(1) and Section 2679(a) *would* include such actions.

The court of appeals' mistaken construction of Section 2676 derives from a fundamental misconception of the FTCA that presumes a clear dichotomy between jurisdictional and non-jurisdictional judgments. That distinction does not withstand scrutiny in the context of the FTCA, in which judgments that would plainly be "on

the merits" in any other context can properly be termed dismissals for lack of subject matter jurisdiction. The Section 2680 exceptions, in particular, confound any simple categorization. The FTCA's jurisdictional provision, Section 1346(b), incorporates the other FTCA provisions, 28 U.S.C. 2671-2680, by reference, and, for that reason, a dismissal on the basis of one of the Section 2680 exceptions can properly be termed a dismissal for lack of subject matter jurisdiction. But that fact does not deprive the exceptions of their *substantive* character as limitations on the scope of the liability to which the United States has subjected itself under the FTCA. The language of Section 2680, which states that the exceptions apply *both* to Section 1346(b) *and* the other provisions of chapter 171, including 28 U.S.C. 2674, which defines the United States' substantive liability, makes clear the dual jurisdictional and substantive nature of the exceptions. Likewise, the inquiry entailed in applying the exceptions, which can involve issues similar to those that arise in other, plainly non-jurisdictional, contexts, and can consume considerable resources through extensive discovery and even trial, evidences their substantive character. Thus, the central premise of the Second Circuit's decision—a clear distinction between dismissals for lack of subject matter jurisdiction and judgments on non-jurisdictional grounds—is mistaken.

ARGUMENT

The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). Before the FTCA's

enactment, parties injured by a government employee's actions were forced to seek relief through private bills in Congress, *ibid.*, or by suing the government employee in his individual capacity, *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage suits." *Ibid.* They also represented a burden on government resources, because "the Government, through the Department of Justice, [was] constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

In the FTCA, Congress "waived sovereign immunity from suit for certain specified torts of federal employees." *Dalehite*, 346 U.S. at 17. The FTCA, however, places a variety of limits on the United States' waiver of its immunity as well as on the scope of the United States' substantive liability under the Act, and does "not assure injured persons damages for all injuries caused by such employees." *Ibid.* Among the FTCA's limits is the judgment bar, 28 U.S.C. 2676. Section 2676 provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Ibid.* Once the FTCA action is the subject of a judgment, that judgment cuts off the claimant's ability to pursue other avenues of relief against government employees. By enacting the FTCA, Congress offered plaintiffs the opportunity to sue a financially responsible defendant, subject to the limits and exceptions Congress placed on the government's liability. By making the judgment bar an inte-

gral part of the FTCA, Congress ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would protect federal employees against the threat and distraction of litigation and protect the government itself from having to expend its resources defending multiple actions arising out of the same incident.

I. THE DISTRICT COURT'S DENIAL OF PETITIONERS' STATUTORY RIGHT TO BE FREE FROM SUIT ON RESPONDENTS' CLAIMS WAS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. This Court Has Recognized The Immediate Appealability Of District Court Orders That Finally Resolve Important Claims Of Right And Would Otherwise Be Effectively Unreviewable, Such As A Government Official's Claim To Immunity From Suit For His Official Acts

"Section 1291 of Title 28, U.S.C., gives courts of appeals jurisdiction over 'all final decisions' of district courts" not immediately appealable to this Court. *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996). The Court has given Section 1291's requirement of a "final decision[]" a "practical rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (noting that Section 1291 specifies "final decisions" rather than "final judgments"). Thus, "the statute entitles a party to appeal not only from a district court decision that 'ends the litigation on the merits and leaves nothing [more] for the court to do but execute the judgment,'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting, with modification, *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)),

but also from a "small class" of district court decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," *Cohen*, 337 U.S. at 546.

Under the "collateral order doctrine" articulated in *Cohen*, the Court applies a three-pronged test to determine whether an order falls within the category of appealable decisions. An appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (brackets in original) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Many of the classes of orders that the Court has held are subject to immediate appeal under the collateral order doctrine involve a defendant's "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In *Mitchell*, the Court upheld a government official's right to take an immediate appeal from a decision denying him qualified immunity, because the benefits of the immunity would be "effectively lost if a case [were] erroneously permitted to go to trial," *ibid.* In *Abney* v. *United States*, *supra*, the Court likewise held that the denial of a double jeopardy challenge to a criminal prosecution is an appealable collateral order. The Court reasoned that the Fifth Amendment's Double Jeopardy Clause protects against "repeated attempts to convict an individual

[defendant] for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." 431 U.S. at 661-662 (quoting *Green* v. *United States*, 355 U.S. 184, 187 (1957)). Only immediate appeal could give "full protection" to that constitutional right "not to face trial at all." 431 U.S. at 662 & n.7.

The Court has also allowed immediate appeal of orders concerning other rights not to stand trial "originating in the Constitution or statutes." *Digital Equip.*, 511 U.S. at 879. Thus, in *Digital Equipment*, the Court distinguished rights "embodied in a constitutional or statutory provision," or those (such as qualified immunity) with a similarly "good pedigree in public law," which are entitled to immediate review, from defenses to suit based solely on a private settlement agreement, which are not. *Id.* at 875, 879. The Court, for example, has allowed immediate appeal of a claim of Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 147, a former President's claim of absolute immunity respecting his official acts, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982), and a Member of Congress's claim that the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1, shields him from suit, *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979). In each case, the Court recognized that the interest protected by the right would "for the most part [be] lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 145. See *Nixon*, 457 U.S. at 752 n.32 (observing that "[a]mong the most persuasive reasons supporting official immunity" is the fact that "to submit [government] officials * * * to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute" (quoting

Gregoire v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)); *Helstoski*, 442 U.S. at 508 ("the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves'") (quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967)).

B. Congress's Specification In Section 2676 That A Prior Federal Tort Claims Act Judgment Is A "Complete Bar To Any Action" Against The Individual Government Employee Creates A Right To Be Free From Suit That Triggers A Right Of Immediate Appeal

The FTCA's judgment bar, 28 U.S.C. 2676, provides that the judgment in an FTCA action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The court of appeals correctly held that the district court's order denying petitioners' motion to dismiss on the basis of the judgment bar was immediately appealable. The judgment bar reflects Congress's concern that federal employees should not be subjected to the burden and distraction of litigation based upon their official acts when the plaintiff has already pursued to judgment a claim based on the same subject matter against the United States itself. Section 2676 thus confers immunity from suit, not merely from liability. The district court order denying petitioners the benefit of their statutory right to be "complete[ly]" free from "any action" related to respondents' claims, which are the subject of a prior FTCA judgment, satisfies all three prongs of the collateral order doctrine and warrants immediate review.

1. It is beyond serious dispute that the district court's order denying petitioners' motion meets the first two criteria for a collateral order: (a) the district court's decision "constitute[s] a complete, formal, and, in the trial court, final rejection" of petitioners' judgment bar claim, *Abney*, 431 U.S. at 659; and (b) the issue presented by petitioners' appeal is "collateral to" and "separable from" the underlying merits of respondents' suit, *ibid.*

a. The district court held conclusively that "the judgment bar statute does not bar plaintiff's *Bivens* suit." Pet. App. 26a. After the district court refused to certify the judgment bar issue for appeal under 28 U.S.C. 1292(b), there were "simply no further steps that [could] be taken in the District Court," *Abney*, 431 U.S. at 659, to "avoid the burdens of 'such *pretrial* matters as discovery,'" *Behrens*, 516 U.S. at 308 (quoting, *Mitchell*, 472 U.S. at 526 (emphasis added)).[1]

b. Further, as in *Mitchell* and *Abney*, petitioners' appeal does not require consideration of the underlying merits of respondents' claims. "An appellate court reviewing the denial of the defendant's [judgment bar] claim * * * need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a

[1] The fact that the district court declined to certify the issue for immediate appeal under the discretionary standard of 28 U.S.C. 1292(b) is irrelevant to petitioners' submission that the order is appealable as of right under 28 U.S.C. 1291, as the district court itself recognized. See *Digital Equipment*, 511 U.S. at 883-884 n.9 ("[W]e find nothing in the text or purposes of either" 28 U.S.C. 1291 or 28 U.S.C. 1292(b) to suggest "that a party's request to appeal under § 1292(b) might operate, practically or legally, to prejudice its claimed right to immediate appeal under § 1291.").

claim." *Mitchell*, 472 U.S. at 527-528. The validity of petitioners' claim to immunity under the judgment bar would not be affected by anything that might occur during the remaining trial proceedings. Whether the judgment bar applies turns not on what facts may ultimately be proven, but on whether there was a prior judgment in the FTCA action and whether respondents' present claim against the federal-employee petitioners arises out of the "same subject matter." 28 U.S.C. 2676. While resolution of petitioners' judgment bar claim may "entail consideration of the factual allegations that make up the plaintiff's claim for relief," *Mitchell*, 472 U.S. at 528, the same is true of questions of qualified immunity, Speech or Debate Clause immunity, and the Fifth Amendment prohibition against double jeopardy, *ibid.* Just as resolution of a double jeopardy claim will require a court of appeals to "compare the facts alleged in the second [action] with those in the first" to determine "whether the prosecutions are for the same offense," *ibid.*, in the case of the judgment bar, the court must compare the facts alleged in the two cases to determine whether the second action is "by reason of the same subject matter" as the first, 28 U.S.C. 2676. In either case, the defendant's motion "makes no challenge whatsoever to the merits of the charge against him," *Abney*, 431 U.S. at 659, and is by its "very nature * * * collateral to, and separable from, the principal issue" in the underlying suit, *ibid.*

2. The court of appeals also correctly held, Pet. App. 10a-11a, that the third prong of the collateral order doctrine is satisfied because the district court's order denying petitioners' rights under the judgment bar would "be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468. As the court of appeals recognized, "Section 2676 * * * con-

fers statutory immunity from suit," which, like qualified immunity, "provides an 'entitlement not to stand trial or face the other burdens of litigation,'" Pet. App. 10a-11a (quoting *Mitchell*, 472 U.S. at 526). Accord *Farmer* v. *Perrill*, 275 F.3d at 961 (Section 2676 "confers immunity from further suit rather than just from liability"). Both the text and purposes of Section 2676 support that conclusion.[2]

By its terms, Section 2676 provides that a prior FTCA judgment is a "complete bar to any action" against a government employee arising out of the same subject matter. 28 U.S.C. 2676. Those terms make plain that the bar does not simply prevent an award of damages against the employee. Rather, it bars the "action" itself and does so "complete[ly]." Only appeal before the employee is subjected to the burdens of discovery and

[2] The only contrary appellate decision is *Brown* v. *United States*, 851 F.2d 615, 618-619 (3d Cir. 1988). In *Brown*, the Third Circuit simply stated, in a single sentence and without elaboration, that the denial of a judgment bar motion "may be reviewed upon appeal from final judgment." *Id.* at 619. The relevant question under the collateral order doctrine, of course, is whether the issue may be *effectively* reviewed on appeal from a final judgment, see, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144, as the Third Circuit in *Brown* itself recognized in holding that the denial of qualified immunity in that case *was* immediately appealable. See 851 F.2d at 619 ("The Supreme Court has held that an order denying a claim of qualified immunity is not *effectively* reviewable after the case is adjudicated and hence is appealable before final judgment under the collateral order doctrine.") (emphasis added). For the reasons stated in the text, a denial of the protection of the judgment bar is no more effectively reviewable on appeal from a final judgment than denials of qualified immunity, Speech or Debate Clause immunity, or Double Jeopardy claims. The Third Circuit, moreover, made no attempt to reconcile its holding with the text and purposes of Section 2676 or with this Court's decisions allowing the immediate appeal of similar orders.

trial can give effect to the statute's promise of a "complete" shield from "any action." See Pet. App. 10a (the judgment bar "confers statutory immunity from suit"); *Farmer*, 275 F.3d at 961.

The legislative purpose behind the judgment bar further demonstrates that it was intended to furnish a "complete" immunity from suit. Congress enacted the FTCA in part to address the concern that "the Government, through the Department of Justice, [was] constantly being called on by the heads of the various agencies to go in and defend" federal employees from suit. *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Francis M. Shea).[3] Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage

[3] Much of the relevant history of the FTCA "appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it." *Gilman*, 347 U.S. at 511 n.2 (citing *Dalehite*, 346 U.S. at 24-30). As the opinion in *Gilman* notes, 347 U.S. at 511 n.2, Assistant Attorney General Shea's remarks were made in specific reference to the provision that became Section 2672 of the FTCA, which provides that an FTCA plaintiff's acceptance of an "award, compromise, or settlement" offered by the Attorney General "shall constitute a complete release of any claim * * * against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter." 28 U.S.C. 2672. The Court recognized, however, the similarities between Section 2672 and Section 2676, *Gilman*, 347 U.S. at 511-512 n.2, as did Assistant Attorney General Shea in his own comments, see *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 27 (1942) ("Judgment in a tort action constitutes a bar to further action upon the same claim, not only against the Government (as would have been true under H.R. 5573), but also against the delinquent employee, *for reasons already discussed in respect of administrative adjustments* of claims up to $1,000.") (emphasis added).

suits." *Ibid.* The FTCA addresses that problem by allowing plaintiffs to sue the United States instead of the individual employee. The judgment bar, which prevents the plaintiff from "turn[ing] around and su[ing]" the individual employee once the FTCA action has gone to judgment, is an essential feature of that statutory scheme. *Ibid.*

As the legislative history reflects, the judgment bar serves the same important purposes as the doctrine of qualified immunity and other forms of government-employee immunity. Like those other immunities, the judgment bar recognizes that there are significant "costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982)). See *Gilman*, 347 U.S. at 511 n.2 (testimony of Assistant Attorney General Shea); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (Section 2676 reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees"), cert. denied, 515 U.S. 1144 (1995). Because Section 2676 is designed to protect against the "very substantial burden * * * in conducting the defense," as well as the impact of tort litigation "upon the morale" of government employees, *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Shea), the cost of delaying appellate review of a judgment bar claim is significant. See *Mitchell*, 472 U.S. at 526-527 (same with respect to qualified immunity). Indeed, it would be strange if the appeal rights of government employees were more robust in the context of judicially-created immunities than in

the context of the "complete bar" expressly provided by Congress. As the Court has previously recognized, where Congress has itself established the right to be free from suit, "there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip.*, 511 U.S. at 879.

At the same time, immediate appeal of the district court's order carries little cost in terms of piecemeal review. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) (observing that *Cohen*'s "finality" standard assesses whether "the danger of denying justice by delay" outweighs "the inconvenience and costs of piecemeal review") (quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). The correctness of the district court's ruling would not be affected by anything that might occur during the remaining trial proceedings. Rather, the appellate court is asked to determine a pure "question of law" that is entirely distinct from either "the merits of the plaintiff's claim" or "the correctness of the plaintiff's version of the facts." *Mitchell*, 472 U.S. at 527-528. Thus, deferring appellate review until after final judgment would not assist the court of appeals in deciding those questions.

For the same reasons, the courts of appeals have uniformly upheld a federal employee's right immediately to appeal a district court's refusal to dismiss claims against him under another provision of the FTCA that provides for substitution of the United States as defendant. In the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, Congress provided that, with certain specified exceptions, the remedy provided by the FTCA "preclude[s]" "[a]ny other civil action

* * * relating to the same subject matter against the employee" for acts within the scope of his employment, and that the United States should be substituted as the defendant. 28 U.S.C. 2679(b)(1), (2) and (d)(1)-(4). Each court of appeals to consider the issue has held that a district court order rejecting the substitution of the United States as defendant is immediately appealable because such an order has the effect of denying the employee the immunity from suit that the Westfall Act guarantees. See *Taboas* v. *Mlynczak*, 149 F.3d 576, 579 (7th Cir. 1998) ("the denial of the United States' motion for substitution in this context is effectively a denial of immunity for the defendant employee," and "the collateral order doctrine therefore applies with as much force in this context as it does to other claims of qualified or absolute immunity"). See also *Rodriquez* v. *Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman* v. *United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr* v. *Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Kimbro* v. *Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *Jamison* v. *Wiley*, 14 F.3d 222, 230 n.10 (4th Cir. 1994); *Melo* v. *Hafer*, 13 F.3d 736, 741 (3d Cir. 1994); *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 873 (9th Cir. 1992); *McHugh* v. *University of Vt.*, 966 F.2d 67, 69 (2d Cir. 1992).

Like Westfall Act immunity, qualified immunity, and other rights of government employees to be free from suit respecting their official conduct, the statutory immunity provided by the FTCA's judgment bar can be reviewed effectively only on immediate appeal from an order denying its protection. The court of appeals correctly concluded that it had jurisdiction pursuant to 28 U.S.C. 1291 to consider petitioners' appeal.

II. THE JUDGMENT BAR APPLIES TO A PRIOR FTCA JUDGMENT BASED ON ONE OF THE ACT'S EXCEPTIONS IN SECTION 2680

A. Under The Plain Language Of The Judgment Bar, The Prior Judgment In Respondents' FTCA Suit Bars Their Present Action Against The Individual Government Employees Whose Conduct Was There At Issue

The text of the FTCA's judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. It is clear that each of the specified elements of the judgment bar is met here.

1. There is no question that the district court entered a "judgment" in respondents' FTCA litigation. On March 21, 2003, the district court issued a Memorandum-Decision and Order in which the court granted the United States' motion to dismiss all of respondents' FTCA claims. The court ruled that "[a]ll of plaintiffs' claims arise out of the detention of their property by agents of the United States, and are therefore barred" by 28 U.S.C. 2680(c). Pet. App. 40a. On that basis, the court "ORDERED that the First Restated and Amended Complaint for Damages is DISMISSED." *Ibid.* On March 24, 2003, the Clerk of Court issued a "Judgment in a Civil Case," stating that "IT IS ORDERED AND ADJUDGED that the First Restated and Amended Complaint for Damages is DISMISSED pursuant to the Order of Judge David N. Hurd dated

3/21/03," J.A. 36. Those actions plainly qualify as the entry of "judgment" in the FTCA action. The district court's order resolved "all the claims and the rights and liabilities of all the parties," see Fed. R. Civ. P. 54(b), and the "judgment" was "set forth on a separate document," pursuant to Federal Rule of Civil Procedure 58. Thus, the judgment entered on March 24, 2003, was an "order from which an appeal lies," and qualified as a "judgment," as that term is defined in the Federal Rules. See Fed. R. Civ. P. 54(a).[4] Indeed, the court of appeals acknowledged that "[a] judgment of dismissal" was entered in respondents' FTCA action, and that "[n]o appeal was taken from that judgment." Pet. App. 6a.

The court of appeals also recognized (Pet. App. 14a-15a) that a judgment under the FTCA triggers the judgment bar in a subsequent suit against a federal employee on the same subject matter even when, as here, the FTCA judgment is adverse to the claimant. The other courts of appeals that have considered the question have unanimously agreed. See *Farmer*, 275 F.3d at 963; *Hoosier Bancorp of Indiana, Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 prescribes a "judgment" bar, not a "favorable judgment" bar. As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer*, 275 F.3d at 963. The first element—the requirement of a "judgment" in the FTCA action—is therefore satisfied.

[4] We note that the prior FTCA judgment here at issue did resolve all claims as to all parties and that the judgment was entered on a separate paper solely to emphasize that the existence of a judgment in this case is beyond dispute. The petition does not present the question whether either of those qualities is a prerequisite to a "judgment" within the meaning of the judgment bar. Notably, when the judgment bar was enacted, there was no separate paper requirement for a judgment. See Charles Alan Wright et al., *Federal Practice and Procedure* § 2785 (1995). Also, some courts have had to determine the judgment bar's effect where FTCA and *Bivens* claims are litigated in the same suit. Several courts have held in such circumstances that where a plaintiff has obtained a judgment against the United States under the FTCA the judgment bar prevents the plaintiff from also enforcing a jury verdict against the individual government employee. See, *e.g.*, *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987); *Serra* v. *Pichardo*, 786 F.2d 237, 241-242 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Neither of those issues is before the Court here.

2. Respondents' prior FTCA suit was also clearly "an action under section 1346(b)." 28 U.S.C. 2676. The sole basis asserted for the district court's jurisdiction in respondents' suit against the United States was the FTCA. The first paragraph of respondents' First Restated and Amended Complaint for Damages, 02-CV-942 (N.D.N.Y.) (which has been lodged with the Court), stated: "This action is brought pursuant to the Federal Tort[] Claim[s] Act, 28 U.S.C. § 1346 and 28 U.S.C. § 2671-2680, and jurisdiction is properly within this Court." The district court order dismissing that complaint likewise recognized that it had been "brought * * * against defendant United States of America ('United States') pursuant to the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346." Pet. App. 27a. And the court of appeals specifically acknowledged that respondents' alleged injury "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346." Pet. App. 5a.

3. Finally, it is plain that the *Bivens* claim asserted in this case arises "by reason of the same subject mat-

ter" as respondents' prior FTCA action. 28 U.S.C. 2676.[5] The breadth of that phrase makes clear that Congress "desired to do more than merely bar a plaintiff from bringing a subsequent identical action on the same claim." *Serra* v. *Pichardo*, 786 F.2d 237, 239 (6th Cir.), cert. denied, 479 U.S. 826 (1986). Rather, so long as "the substance of the *Bivens* claims reveals that they arise from the same actions toward plaintiff by defendants as those that defined the FTCA case," the "same subject matter" test is satisfied. *Id.* at 241; *Arevalo* v. *Woods*, 811 F.2d 487, 490 (9th Cir. 1987) (quoting same).

A comparison of the complaints at issue here leaves no question that the two actions arise out of "the same subject matter." Respondents' *Bivens* complaint repeats, verbatim, the allegations of respondents' FTCA complaint that "[o]n June 8, 2000, at approximately 9:00 A.M., * * * [at] premises located at 194 Ferncliff Road," federal agents "seized all computer equipment, computer software, computer data, and computer hard disk drives," and that, when the computers and hard drives were returned six months later, several "had been damaged to the extent of being totally unusable," and five disk drives were "damaged to the point of complete loss of all stored data," resulting in "special damages in the amount of $4,421,700." See FTCA Compl. 3, 5, 11; J.A. 30-31, 33, 34 (First Amended *Bivens* Compl.). These identical allegations and demands for relief satisfy any reasonable construction of Section 2676's "same subject matter" requirement.

[5] As we point out in our reply brief at the petition stage (at 6), all six courts of appeals to have considered the question, including the Second Circuit in this case, have correctly held that the judgment bar in Section 2676 applies to *Bivens* actions in the same manner that it applies to other suits against federal employees that arise out of the same subject matter as the FTCA action. See Pet. App. 12a-14a; *Farmer*, 275 F.3d at 963; *Hoosier Bancorp*, 90 F.3d at 184-185; *Gasho*, 39 F.3d at 1437-1438; *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra*, 786 F.2d at 241. That conclusion is compelled by the unqualified statutory text, which bars "*any* action by the claimant" against the employees arising out of the same subject matter. 28 U.S.C. 2676 (emphasis added).

The only difference between respondents' complaints is the level of culpability attributed to the federal agents. In their FTCA complaint, respondents alleged that the damage was caused by the government officials' "misuse, negligent and improper handling, * * * and perhaps intent," FTCA Compl. 6, whereas in their amended *Bivens* complaint, respondents have dropped the negligence allegation and maintain only that petitioners "intentionally caused" the damage, J.A. 33.[6] A plaintiff cannot, however, defeat the judgment bar simply by revising the level of scienter with which the federal employees are alleged to have acted. It is the conduct of the employees that allegedly caused the injury in the two cases—not the employees' alleged state of mind —that determines whether the subsequent suit against the individual employees arises out of the "same subject matter" as the prior FTCA action. See *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) ("same subject matter" refers to the "factual provenance and not the character of the claim"); *Serra*, 786 F.2d at 241 (noting that "[t]he only difference between the claims is that the

[6] Respondents' original complaint in this action retained the allegation that petitioners acted negligently, and it asserted common-law negligence causes of action as well as a *Bivens* claim. J.A. 24-26. Those allegations were dropped when, after petitioners moved to dismiss, respondents filed their First Amended Complaint asserting only a cause of action under *Bivens*. J.A. 34.

Bivens claims involve an examination of the intent of the defendants").

4. In their brief in opposition in this Court, respondents conceded that their *Bivens* suit would be barred under the "literal, unconditional text" of Section 2676. Br. in Opp. 6. Respondents urged, however, that the action should be permitted to proceed "despite" the statute's language based on unwritten limitations that respondents urged the Court to read into the provision. *Ibid.* Similarly, the court of appeals recognized that respondents' alleged injury "was the subject of a previous action brought by plaintiffs against the United States of America under the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 1346," Pet. App. 5a, but refused to enforce the judgment bar on the theory that although the prior suit was brought under the FTCA, it "was not *properly* brought *under* the Federal Tort Claims Act in the first place and is a nullity." *Id.* at 14a.

There was no justification for the court of appeals to engraft additional qualifications onto the statute. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). See *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (quoting same); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (analysis of a statute "begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well") (citation and internal quotation marks omitted). There is no argument here that applying Section 2676 by its terms would be absurd. To the contrary, as we demonstrate below, it is the court of

appeals' modification of the text that renders the statute unworkable. See pp. 38-49, *infra*.

B. Application Of The Judgment Bar In This Case Is Confirmed By This Court's Construction Of Nearly Identically Worded Provisions Of The FTCA

Application of the judgment bar according to its "literal, unconditional text," Br. in Op. 6, is, moreover, consistent with the way in which this Court and the courts of appeals have construed parallel text in the FTCA's exclusivity provisions, 28 U.S.C. 2679(a) and (b). Statutory text must be construed "in its context and in light of the terms surrounding it." *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 382 (2004). The Second Circuit's interpretation of Section 2676 fails that test, because it creates unwarranted incongruities between the phrase "action under Section 1346(b)" in that section and similar phrases with similar purposes in the FTCA's exclusivity provisions.

Like Section 2676, the FTCA's exclusivity provisions specify circumstances in which the FTCA precludes a plaintiff from suing a party other than the United States based upon the actions of federal employees. Like Section 2676, the exclusivity provisions define the scope of their application with reference to Section 1346(b). Both Section 2679(a) and Section 2679(b), the courts have held, encompass actions that satisfy the basic elements of Section 1346(b), even though recovery against the United States may ultimately be precluded by one of the exceptions in Section 2680. The Second Circuit's construction of the phrase "judgment in an action under section 1346(b)" in Section 2676 as including only those actions properly brought under that Section and excluding judgments based on the Section 2680 exceptions cannot be squared with the settled construction of the parallel provisions in Section 2679(a) and Section 2679(b).

1. *Section 2679(b).* Section 2679(b) of the FTCA, adopted as part of the Westfall Act, states that, with certain exceptions, "[t]he remedy against the United States provided by sections 1346(b) and 2672 of this title" is exclusive and that a claim against the employee whose conduct is at issue is precluded. 28 U.S.C. 2679(b)(1) and (2).[7] In *United States* v. *Smith*, 499 U.S. 160 (1991), this Court rejected a construction of Section 2679(b)(1)'s phrase "remedy * * * provided by sections 1346(b) and 2672" that was nearly identical to (though actually more textually plausible than) the reading of Section 2676's phrase "action under section 1346(b)" that the court of appeals adopted here.

The Ninth Circuit in *Smith* had held that Section 2679(b)'s exclusive-remedy provision could foreclose a suit against the federal employee in his individual capacity only if the FTCA would in fact provide the plaintiff a remedy once the United States was substituted as the defendant. See *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (9th Cir. 1989). Because the FTCA's foreign country exception, 28 U.S.C. 2680(k), would have precluded recovery against the United States in an action under

[7] Section 2679(b)(2) creates an exception to the general rule of FTCA exclusivity for *Bivens* and certain statutory actions. See 28 U.S.C. 2679(b)(2). Section 2679(b)(2)(A)'s explicit carve-out for *Bivens* claims is an additional reason *not* to read an implied exception for *Bivens* claims into Section 2676. See *supra* n.5. The Westfall Act exception for *Bivens* claims makes clear that Congress knew how to preserve constitutional-tort liability of federal employees when it desired to do so, and that inferring other exceptions in the FTCA is not warranted. See *United States* v. *Smith*, 499 U.S. 160, 166-167 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

Section 1346(b), the Ninth Circuit held that Section 1346(b) did not provide the plaintiff a remedy against the United States and that Section 2679(b) therefore did not prevent the suit from going forward against the employee. See *Smith*, 885 F.2d at 655.

This Court reversed, holding that Section 2679(b) bars suit against an individual employee even if, as a result of one of Section 2680's exceptions, "the FTCA itself does not provide a means of recovery." *Smith*, 499 U.S. at 166. The Court supported its construction of Section 2679(b) by referring to Section 2679(d). That section provides that, if a tort suit is brought against a federal employee who was acting within the scope of his employment, the United States is to be substituted as the defendant, see 28 U.S.C. 2679(d)(1), (2) and (3), and the suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) * * * and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). The Court reasoned that the "limitations and exceptions" language in Section 2679(d)(4) encompasses the "exceptions" in Section 2680, and demonstrated that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166. In other words, the "remedy * * * provided by section[] 1346(b)," 28 U.S.C. 2679(b)(1), might well be an action under Section 1346(b) that is later dismissed based on one of the exceptions in Section 2680.

The court of appeals' construction of Section 2676 in this case cannot be reconciled with *Smith*'s construction of Sections 2679(b)(1) and (d)(4). The operative text of

the provisions is parallel, and there is no basis for the greatly divergent construction that the court of appeals would give them. Just as the phrase "[t]he remedy * * * provided by section[] 1346(b)" in Section 2679(b)(1) and the phrase "action against the United States filed pursuant to section 1346(b)" in Section 2679(d)(4) include cases in which a claim brought under Section 1346(b) would ultimately be held precluded by Section 2680, so too the phrase "an action under section 1346(b)" in the FTCA's judgment bar includes a case brought under Section 1346(b) that is later determined to be precluded by Section 2680. Indeed, if anything, Section 2679(b)'s reference to "[t]he remedy" might more plausibly be thought to exclude cases in which the FTCA does not provide a remedy than the judgment bar's reference to "[t]he judgment in an action under section 1346(b)" could be read to exclude cases brought under Section 1346(b) but subject to dismissal under Section 2680. Thus, the Second Circuit's efforts to limit the reach of the judgment bar are inconsistent with the Court's decision in *Smith*.

2. *Section 2679(a).* The Second Circuit's construction of Section 2676 also cannot be squared with this Court's construction of the FTCA's other exclusivity provision, 28 U.S.C. 2679(a). Section 2679(a) makes the FTCA the exclusive avenue for tort claims against the federal government, including against agencies that may otherwise "sue and be sued" in their own names. See *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are *cognizable under section 1346(b)* of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a) (emphasis added).

In *Meyer*, the Court held that a claim is "cognizable under section 1346(b)" if it is within the category of claims defined by Section 1346(b), which consists of:

> claims that are "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

510 U.S. at 477 (brackets in original) (quoting 28 U.S.C. 1346(b)). The Court explained that a claim "comes within this jurisdictional grant—and thus is 'cognizable' under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above." *Ibid.* Indeed, the Court emphasized that "[t]he question is not whether a claim is cognizable *under the FTCA* generally, * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. *Id.* at 477 n.5 (quoting 28 U.S.C. 2679(a)).

Applying *Meyer*, several courts of appeals have recognized that a claim is "cognizable under section 1346(b)," and thus precludes suit against the agency directly, so long as the claim asserts the six elements listed in Section 1346(b), even if the FTCA as a whole would not render the United States liable due to one or more of the exceptions in Section 2680. See *Audio Od-*

yssey, Ltd. v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *USPS*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999). Those decisions make clear that under Section 2679(a), an action is "cognizable under section 1346(b)" so long as it asserts a tort claim under state law, even if that claim is ultimately rejected because of the application of one of the exceptions in Section 2680.

The decision of the court of appeals in this case, by contrast, makes the very mistake the Court warned against in *Meyer*. Whereas Section 2676 refers to an "action under section 1346(b)," the court of appeals rewrote the statute as requiring an "action * * * *properly* brought *under* the Federal Tort Claims Act" generally, and thus not to apply to an action brought under Section 1346(b) where recovery is later found to be barred by one of the exceptions in Section 2680. Pet. App. 14a.

The court of appeals made no effort to harmonize its construction of the phrase "action under section 1346" for purposes of 28 U.S.C. 2676, and the established meaning of the phrase "cognizable under section 1346(b)" in 28 U.S.C. 2679(a). Nor is there any apparent basis for treating the two phrases so differently. To the contrary, *Meyer* specifically equated the phrase "cognizable under section 1346(b)" with the phrase "actionable under § 1346(b)," 510 U.S. at 477, which is virtually indistinguishable from Section 2676's phrase "action under section 1346(b)." If, as *Meyer* held, a claim that "alleges the six elements outlined above" is "actionable under § 1346(b)," *ibid.*, then, clearly, a complaint that alleges those six elements and asserts Section 1346(b) as the

basis for jurisdiction, as respondents' FTCA complaint did, is an "action under section 1346(b)," 28 U.S.C. 2676.

3. *Smith* and *Meyer* compel the conclusion that the phrase "an action under section 1346(b)" applies to any claim brought under Section 1346(b), even if recovery ultimately is denied based on some other provision of the FTCA. The exclusivity provisions of Section 2679(a) and (b) require dismissal of claims against defendants other than the United States before the court or the parties know whether an FTCA action against the United States under Section 1346(b) will ultimately lead to recovery. In contrast, Section 2676, at issue here, bars claims against individual employees after a plaintiff has already pursued an action under Section 1346(b) to judgment. In each case, however, the bar to other suits is defined by reference to Section 1346(b). There is no basis for the widely divergent interpretations that the Second Circuit's rule would attribute to these closely parallel phrases.

Moreover, the exclusivity provisions demonstrate the illogic of the court of appeals' reasoning, even on its own terms. The court of appeals reasoned that a dismissal based on one of the FTCA's exceptions—in this case, on the ground that the claims fell within the FTCA's detention-of-goods exception in 28 U.S.C. 2680(c)—was a dismissal "for lack of subject matter jurisdiction" and that the prior suit therefore "was not *properly* brought *under* the Federal Tort Claims Act in the first place" and rendered the FTCA action "a nullity" to which Section 2676 did not apply. Pet. App. 14a. Plainly, however, as the exclusivity provisions and this Court's decisions interpreting them make perfectly clear, there is nothing "improper" about the claimant's invoking the FTCA, the sole available basis for a tort action against the United

States, even if she is not successful in doing so. Nor does disposition of the FTCA action on the basis of one of the exceptions in Section 2680 render either the action itself or the resulting judgment a "nullity."

As respondents have conceded, under the "literal, unconditional text" of Section 2676 (Br. in Opp. 6), the judgment in their prior FTCA action under Section 1346(b) bars their present suit. The court of appeals' imposition of a further requirement that the prior judgment be on grounds other than one of the exceptions in Section 2680 is not only contrary to the text and purposes of Section 2676, it is, as the foregoing demonstrates, inconsistent with the "context and * * * terms surrounding" the judgment bar and the way this Court has interpreted those terms. *Leocal*, 125 S. Ct. at 382.

C. The Court Of Appeals' Holding That A Dismissal Based On A Section 2680 Exception Is Outside The Scope Of Section 2676 Is Inconsistent With The Structure Of The Act And The Nature Of The Exceptions In Section 2680

The court of appeals' reasoning also ignores the nature of the FTCA's exceptions. As the Second Circuit noted (Pet. App. 14a), the FTCA exceptions limit the United States' waiver of its sovereign immunity and, in that sense, constrain the courts' exercise of jurisdiction. However, the text and structure of the FTCA make clear that they are not merely jurisdictional. The FTCA's restrictions and exceptions, especially those of Section 2680, also mark substantive limitations on the United States' liability under the Act. The court of appeals' attempt to carve judgments based on Section 2680 out of the scope of the judgment bar, on the ground that such a judgment rests solely on jurisdictional bases and is therefore a "nullity," cannot be squared with the

structure of the FTCA, the nature of its exceptions, or the purpose of the judgment bar.

1. The court of appeals' premise of a clear distinction between jurisdictional and other FTCA defenses is at odds with the structure of the Act

The court of appeals' interpretation of Section 2676 presupposes a clear and meaningful distinction between judgments based on a lack of jurisdiction and judgments on other grounds, but the structure of the FTCA does not provide for any such ready distinction. For purposes of the FTCA, many grounds for denying recovery, including those set forth in Section 2680, are both jurisdictional *and* substantive.

In particular, the FTCA exceptions enumerated in Section 2680 function inseparably as jurisdictional limitations on the United States' waiver of its sovereign immunity *and* as substantive restrictions on the United States' liability under Section 2674. Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, but does so "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of "chapter 171"—including Section 2674 ("Liability of United States") and Section 2680 ("Exceptions") —in turn create and define the scope of the United States' substantive tort liability. Those provisions are referred to elsewhere in the FTCA as "the limitations and exceptions applicable" to "any action * * * pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Because they are incorporated by reference into Section 1346(b)(1), they are *also* conditions on the waiver of sovereign immunity and limitations on the jurisdiction of the district court. But that does not deprive them of

their separate substantive character as well. Thus, Section 2680 itself provides that both the "provisions of this chapter" (*i.e.*, Chapter 171, containing the FTCA's procedural and substantive provisions) *and* "section 1346(b) of this title" (the waiver of sovereign immunity and grant of jurisdiction) "shall not apply" to claims falling within the exceptions.

This Court's own description of the exceptions set forth in Section 2680 also reflects their nature as limitations on the United States' substantive FTCA liability. In *United States* v. *Gaubert*, 499 U.S. 315 (1991), for example, the Court stated that "[t]he liability of the United States under the FTCA is subject to the various exceptions contained in § 2680," and it described Section 2680(a) as providing that "the Government is not liable for" a claim based on the performance of a discretionary function. *Id.* at 322. See also *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992) (referring to the "various statutory exceptions to FTCA liability contained in § 2680"). And, more broadly, the Court has explained that the exceptions in Section 2680 were designed to mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984).[8]

[8] The principal draftsman of Section 2680 likewise described the exceptions provided there as "exceptions to liability." See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, including what ultimately became Section 2680(c)]."). Although "the [Holtzoff] report was never introduced into the public record," and therefore should not be given "great weight," the Court has recognized that, "in the absence of any direct evidence regarding how members of Congress understood" the Section 2680 exceptions, it is "senseless to ignore entirely the views of its draftsman." *Kosak* v. *United States*, 465 U.S. 848, 857 n.13 (1984).

Moreover, the Court has recognized the inherently substantive nature of limitations of this sort, even though phrased in jurisdictional terms. As the Court recently explained in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 695 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they are jurisdictional by virtue of their incorporation into 28 U.S.C. 1346(b), they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." 541 U.S. at 695 n.15.

The court of appeals' discussion of how a statute of limitations defense would be treated under its interpretation of Section 2676 underscores the unworkability of relying on an asserted distinction between "substantive" and "jurisdictional" dismissals for purposes of applying the FTCA's judgment bar. As this Court has recognized, a dismissal on statute-of-limitations grounds is a "judgment on the merits" that is treated like a "dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995). The

court of appeals in this case likewise recognized that a judgment dismissing an FTCA action on statute-of-limitations grounds *would* trigger the judgment bar. Pet. App. 14a-15a. In the special context of the FTCA, however, restrictions on a plaintiff's ability to sue the United States—including statutes of limitation—are also necessarily limitations on the United States' waiver of its sovereign immunity. See *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) ("[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction," including, "[i]n particular, '[w]hen waiver legislation contains a statute of limitations'") (quoting *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983)); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Thus, as the Second Circuit has elsewhere recognized, a dismissal on the basis of the FTCA's statute of limitations, 28 U.S.C. 2401(b), is also a dismissal for lack of jurisdiction. See *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189-190 (1999); *Millares Guiraldes de Tineo* v. *United States*, 137 F.3d 715, 719-720 (1998). The Second Circuit in this case failed to explain why a judgment based on lack of jurisdiction on statute-of-limitations grounds should trigger the judgment bar, while a judgment based on Section 2680(c) does not.[9]

[9] Indeed, under the FTCA, even a finding that the plaintiff's claim fails to satisfy the substantive elements of a state-law cause of action might be regarded as a dismissal for lack of jurisdiction. The FTCA provision entitled "Liability of United States," 28 U.S.C. 2674, provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances." It cannot seriously be disputed that a dismissal on the ground that state law would not provide a cause of action against a similarly situated private person would be a dismissal on the merits of the plaintiff's claim and would trigger the FTCA's judgment bar. Notably, however, 28 U.S.C. 1346(b)(1) imposes a nearly identical limitation on the grant of jurisdiction and resulting waiver of immunity, confining their scope to those circumstances in which "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Accordingly, some courts in FTCA actions have treated a determination that a private person could not be held liable under state law as a holding that the court lacks jurisdiction. See *Makarova* v. *United States*, 201 F.3d 110, 116 (2d Cir. 2000) (affirming "dismissal for lack of subject matter jurisdiction" because plaintiff "could not have brought suit against a private employer in Washington, D.C.," which made workers' compensation an exclusive remedy); *Gould Elecs., Inc.* v. *United States*, 220 F.3d 169, 192 (3d Cir. 2000) (holding that the district court "lacked subject matter jurisdiction over the indemnity claim" because "the United States would not be liable" under the law of the relevant jurisdictions). It would be absurd, however, to conclude that a judgment dismissing an FTCA action on such grounds was "a nullity," Pet. App. 14a, for purposes of the judgment bar simply because the judgment-issuing court based its rationale on the reference to the liability of private persons in Section 1346(b) rather than Section 2674.

As the foregoing discussion demonstrates, the Second Circuit's assumption that there is a significant distinction between dismissals based on an exception in Section 2680 and other types of dismissals for purposes of the FTCA's judgment bar is at odds with overall the structure of the Act. Clearly, then, it cannot serve as a basis for imposing a limitation on the scope of Section 2676's judgment bar that appears nowhere in the text of that provision.

2. The substantive nature of Section 2680's exceptions is further evidenced by the nature of the inquiry they entail

The substantive character of the FTCA's exceptions in Section 2680 is also revealed in the nature and scope of the inquiry they can require of the courts in order to

determine their application. "[I]n most instances subject-matter jurisdiction will involve no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587 (1999)). In contrast, judgment in the government's favor on the basis of one of the FTCA exceptions frequently comes only after extensive litigation. That is so because the determination the court must make to resolve the applicability of one of the exceptions is, in many cases, not meaningfully different from rulings in other, unquestionably merits-related, contexts. On this level, as well, the court of appeals' proposed distinction breaks down.

A review of FTCA decisions shows that, in many cases, litigation of the government's assertion of a Section 2680 exception consumes considerable time and energy on the part of the government and judiciary. Frequently, the applicability of one of the exceptions is not resolved until "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985). See, *e.g.*, *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."). The Tenth Circuit has, in fact, adopted a general rule that, because "[t]he determination of whether the FTCA excepts the government's actions from its waiver of sovereign immunity involves both jurisdictional and merits issues," the question should be decided on summary judgment under Federal Rule of Civil Procedure 56. *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (internal quotation marks omitted). In many other cases, the government's invocation of an exception in Section 2680 is ultimately vindicated only on appeal, after the case has already been litigated to

judgment following a trial. See, *e.g.*, *Varig Airlines*, 467 U.S. at 803-804, 821; *Kelly* v. *United States*, 241 F.3d 755, 757 (9th Cir. 2001) (on appeal from judgment after trial, holding that action was barred by discretionary function exception and remanding "to dismiss * * * for lack of subject matter jurisdiction"); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (same).

The factual inquiry that courts have sometimes found to be necessary to determine the application of one of the exceptions in Section 2680 is due to the inherently substantive character of the inquiry. The discretionary function exception, 28 U.S.C. 2680(a), for example, presents questions that are very similar in nature to those that arise under the common-law doctrine of official immunity. Section 2680(a) provides that the United States cannot be held liable under the FTCA on a claim arising out of the performance of "a discretionary function or duty" on the part of a federal employee or agency. *Ibid.* Application of that exception involves an inquiry similar to that used to determine whether a federal employee is entitled to common-law immunity from a state-law tort claim—a non-jurisdictional defense. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), the Court held that federal officials have immunity from state-law tort liability only if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.* at 300. As the Court recognized, that inquiry is "complex and often highly empirical." *Ibid.* It often may be so in the context of the FTCA as well.

These cases demonstrate that it is not uncommon for the United States to invest considerable resources (with attendant distractions to the government employee whose conduct is at issue) in defending an FTCA suit on the basis of a Section 2680 exception. Plainly, it would

be contrary to both the text and the policies underlying the FTCA's judgment bar to permit the plaintiff then to "turn around and sue" the individual employee, thereby imposing "a very substantial burden" to defend against the suit a second time. *Gilman*, 347 U.S. at 511 n.2 (quoting testimony of Assistant Attorney General Shea).

The court of appeals would apparently solve this problem by deeming a denial of relief based on Section 2680 at the summary judgment stage of the litigation a case decided "on the merits," to which the judgment bar would apply. Indeed, the court sought to distinguish *Gasho* on this basis. Pet. App. 13a. In *Gasho*, the Ninth Circuit held that *Bivens* claims arising out of the seizure of an aircraft were precluded by the judgment bar because the court had already held that an FTCA claim based on the same seizure was foreclosed by the FTCA's detention-of-goods exception. See 39 F.3d at 1433-1434, 1436, 1437-1438. Because the basis of the prior judgment in *Gasho* was the same FTCA exception that was the basis for the dismissal of respondents' FTCA action in this case, it appears that the Second Circuit's attempt to distinguish *Gasho* as decided "on the merits" was a reference to the fact that, in that case, the decision holding that Section 2680(c) foreclosed the plaintiffs' seizure claim was reached at the summary judgment stage, 39 F.3d at 1432-1433, whereas the FTCA judgment in this case was entered on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), Pet. App. 21a & n.2. That purported distinction, however, only underscores the extent to which the application of the judgment bar as the Second Circuit has construed it would turn on procedural fortuities having no support in the text or purposes of Section 2676.

This case, in fact, exemplifies the problem with making the operation of Section 2676 turn on such distinctions. The United States moved to dismiss respondents' FTCA action under both Rule 12(b)(1) and Rule 12(b)(6). See Pet. App. 30a. And the district court, in dismissing the FTCA claim, noted that "[w]hile the court should consider the Rule 12(b)(1) challenge first," "the United States' motion is well taken even under the more lenient Rule 12(b)(6)." *Ibid.* Although the district court later stated, on consideration of petitioners' Section 2676 motion in the *Bivens* action, that its references to Rule 12(b)(6) had been mere "dicta," *id.* at 21a n.2, the court's original discussion implicitly acknowledged that the United States' motion had both a jurisdictional and a substantive aspect. Indeed, this Court has itself articulated the standard of review for a motion to dismiss on Section 2680 grounds in the same terms as those used in Rule 12(b)(6). Compare *Gaubert*, 499 U.S. at 327 (motion to dismiss on the basis of Section 2680(a) asks "whether the allegations state a claim sufficient to survive a motion to dismiss"), with Rule 12(b)(6) (motion to dismiss for "failure to state a claim upon which relief can be granted"). The effect of a judgment for purposes of the judgment bar should not depend upon the procedural rule relied upon by the district court when it enters judgment in an FTCA action. Compare *Welch* v. *United States*, 409 F.3d 646, 649-650 (4th Cir. 2005) (district court dismissed claims for lack of jurisdiction under Rule 12(b)(1), because claims fell within 28 U.S.C. 2680(a) exception); *Jerome Stevens Pharms., Inc.* v. *FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005) (same); *Whisnant* v. *United States*, 400 F.3d 1177, 1179 (9th Cir. 2005) (same), with *Franklin Sav. Corp.*, 180 F.3d at 1129-1130 (district court dismissed claim for failure to

state a claim under Fed. R. Civ. P. 12(b)(6) on the basis of 28 U.S.C. 2680(a)); *ALX El Dorado, Inc.* v. *Southwest Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409, 410 (5th Cir. 1994) (same); *Stuto* v. *Fleishman*, 164 F.3d 820, 824-825 (2d Cir. 1999) (same), and *Bell*, 127 F.3d at 1228 (treating government's motion to dismiss on the basis of the discretionary function exception "as a Rule 56 motion for summary judgment"); *Mercado Del Valle* v. *United States*, 856 F.2d 406, 406-407 (1st Cir. 1988) (district court granted summary judgment based on 28 U.S.C. 2680(a)).[10]

Because respondents brought an FTCA action under Section 1346(b) and judgment was entered in that action, Section 2676 applies to their present *Bivens* suit. The court of appeals' holding that the judgment bar is inapplicable in these circumstances is contrary to the text and purposes of Section 2676, the settled construction of similarly worded provisions elsewhere in the FTCA, and the nature of the Section 2680 exceptions as evidenced by the Act's larger structure.

[10] The cases that have reached this Court concerning the FTCA exceptions in 2680 reflect a similar variation with respect to the rule cited in entering judgment in the government's favor based on one of the FTCA exceptions. Compare *Smith* v. *United States*, 507 U.S. 197, 199-200 (1993) (affirming district court's dismissal "for lack of subject-matter jurisdiction" because claim was barred by 28 U.S.C. 2680(k)), with *Kosak* v. *United States*, 465 U.S. 848, 851 (1984) (affirming court of appeals judgment that "petitioner had failed to state a claim on which relief could be granted" because 28 U.S.C. 2680(c) shields the United States from liability).

CONCLUSION

This Court should hold that the court of appeals had jurisdiction of petitioners' appeal under 28 U.S.C. 1291, and should reverse the judgment of the court of appeals and remand with instructions to dismiss respondents' action as barred by 28 U.S.C. 2676.

Respectfully submitted.

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AUGUST 2005

APPENDIX

1. Title 28 of the United States Code provides in pertinent part:

28 U.S.C. 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * * *

28 U.S.C. 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred[.]

* * * * *

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

* * * * *

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * * * *

28 U.S.C. 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

* * * * *

28 U.S.C. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on

claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for

any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action

or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based

upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the

property was subject to forfeiture under a Federal criminal forfeiture law.[1]

* * * * *

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[1] So in original.